

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.06.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.1080 of 1990
and
C.M.P.Nos.8167 of 1990,
12230 of 1990, 9925, 9926 of 2005

1. Jayalakshmi (died)
2. Gnanambal
3. Hariputhri Gounder
4. Devaki
5. Pushpa
6. Malar
7. Poovarasi
8. Poongodai

... Appellants 3 to 8 brought on record as L. Rs of the deceased first appellant vide order of Court dated 6.1.2006 made in C.M.P.Nos.9925 to 9927/2005.

... Appellants/Plaintiffs

Vs.

1. Govindammal
2. Rukmani
3. Muniammal (died)
4. Cauvery
5. Kala
6. Malarvizhi
7. Rajagopal Gounder
8. Kasiammal
9. Anantharaman
10. Arul

R9 and R10 brought on record as Lrs.of the deceased third respondent vide order of court dated 09.03.2007 made in C.M.P.No.7590 to 7592 of 2005

... Respondents/Defendants

PRAYER: First Appeal against the Judgment and decree dated 22.02.1990 made in O.S.No.3 of 1988 on the file of the Subordinate Judge, Tindivanam.

For Appellants : Mr.T.Dhanyakumar
For Respondents : Mr.R.Subramaniam
for Mr.V.Krishnan for R4 to 8
R1 Given up
R2 No Appearance
R3 (died) Steps taken

J U D G M E N T

The plaintiffs in the Court below are the appellants in this First Appeal. Pending appeal the first appellant died and her legal representatives have been brought on record as appellants 3 to 8. The suit in O.S.No.3 of 1988 was filed dated 13.03.1987 to permit them to file the same as indigent persons and subsequently after the order, it was numbered on 08.01.1988. The suit for partition and a separate possession of two fifth shares of the plaintiffs in the suit properties, apart from mesne profit of Rs.15,000/-. The suit properties consist of 23 items of Punja lands situated in Pudupakkam Village, Vanoore Taluk, Tindivanam.

2. The first and second plaintiffs are the sisters. Originally, the suit properties belonged to Murugesu Gounder and his wife Annammal, who are the father and mother of the plaintiffs. The said Murugesu Gounder and Annammal were having four daughters, who are the plaintiffs as well as defendants 1 and 2 and one son Vengadapathy Gounder who married Machavalli who died before Vengadapathy Gounder. Vengadapathy Gounder died leaving behind him his four daughters who were defendants 3,4,5 and 6. The third defendant Muniyammal who is the third respondent in the appeal died pending appeal and her husband and son who are the legal heirs were impleaded as respondents 9 and 10 in the appeal.

3. The defendant 7 and 8 were purchasers from defendants 3 to 6. According to the plaintiffs all the suit properties absolutely belonged to Murugesu Gounder and he has gifted half of the properties by way of settlement to his wife Annammal on 16.09.1959 marked as Ex.A.1. Murugesu Gounder died intestate and after his death all his four sisters and one Vengadapathy Gounder have divided their share into five parts and enjoyed their portion. After Murugesu Gounder's death, his wife Annammal also died intestate and therefore, the plaintiffs as well as defendants 1 and 2 apart from Vengadapathy Gounder have succeeded equally in her share also. Therefore, the plaintiffs are entitled for 2/5th share and the first and second defendants for 2/5th share and defendants 3 to 6 being the legal heirs of Vengadapathy Gounder are entitled for 1/5th share. It is the case of the plaintiffs that the father Murugesu Gounder died 10 years before the filing of the suit.

4. According to the plaintiffs their brother Vengadapathy Gounder also died three years before the filing of the suit. The first and second defendants along with the legal heirs of Vengadapathy Gounder, namely, defendants 3 to 6 have joined together to exclude the plaintiffs from the properties. The plaintiffs have issued a legal notice on 23.02.1987 for which the defendants have given reply on 02.03.1987 with untenable grounds. According to the plaintiffs any settlement given to Annammal by Murugesha Gounder on 16.09.1959 is void. Therefore, any disposition in favour of Vengadapathy Gounder by Annammal cannot be also valid. It is also denied by the plaintiffs that Annammal has executed any Will in favour of Vengadapathy Gounder and according to the plaintiffs it should be only a forged document.

5. The third defendant filed the written statement, as adopted by defendants 4 to 6 while the first and second defendants remained exparte. According to the third defendant while the relationship between the parties as stated, are admitted, it is denied that originally the properties belonged to Murugesha Gounder and his wife Annammal. It is also denied that Murugesha Gounder is the absolute owner of the properties. It is the case of the third defendant that some of the properties were purchased by her father Vengadapathy Gounder other than the properties which were purchased by Vengadapathy Gounder only the other properties were belonging to Murugesha Gounder. While it is true that Murugesha Gounder has given a settlement deed in favour of his wife Annammal, it is the case of the third defendant that the remaining properties have been given by Murugesha Gounder to Vengadapathy Gounder.

6. It is the case of the third defendant that Murugesha Gounder has given all the properties received to his share in favour of his wife Annammal on 16.09.1959 and all other properties were given by him to Vengadapathy Gounder and Murugesha Gounder was not entitled any property for himself. Therefore, according to the third defendant, since Murugesha Gounder has settled the properties retained by him in favour of his wife and given the remaining properties in favour of his son Vengadapathy Gounder, it cannot be said that Murugesha Gounder died intestate. It is also denied that after Murugesha Gounder's death the plaintiffs as well as defendants 1 and 2 and Vengadapathy Gounder have divided the properties. There was no such partition at any time. It is also the specific case of the third defendant that Annmmal died intestate and all properties which she has obtained by way of settlement from her husband, has been given to (late) Vengadapathy Gounder, namely, her son under a registered Will executed on 22.06.1964. Therefore, Annammal has not left any properties or died intestate. It is also denied that defendants 1 and 2 and the

other defendants have excluded the plaintiffs. It is also denied that the settlement executed by Murugesu Gounder on 16.09.1959 is not valid. It is also denied that the Will executed by Annammal on 22.06.1964 in favour of Venkadapathy Gounder is a forged one.

7. In the additional written statement filed by the third defendant, the third defendant while admitting that 7th and 8th defendants were the purchasers, it was her case that after defendants 3 to 6 have partitioned among themselves on 12.12.1987 they have sold item No.14 to the extent of 0.85 and item No.17, 21 and 22 to the 7th defendant for a consideration of Rs.32,500/-. Likewise, even before the suit was filed defendants 3 to 6 have sold to 8th defendant item No.11 of the suit properties to the extent of 0.40 cents and he is in possession. Apart from 7th and 8th defendants one Kumarasamy has also purchased some of the items of the properties. Since the 7th and 8th defendants have entered into the shoes of the defendants 3 to 6, the plaintiffs are estopped from questioning the said documents. The 7th and 8th defendants have filed written statement stating that they are the bonafide purchaser for valuable consideration without notice of defective title. It is with the above pleadings, the parties went to trial. On the side of the plaintiffs, the first plaintiff was examined as P.W.1 apart from another witness P.W.2 and six documents marked as Ex.A.1 to A.6. Likewise, on the side of the defendants, the third defendant was examined as D.W.1 and seventh defendant was examined as D.W.4, apart from four other witnesses examined as D.W.2, D.W.3, D.W.5 and D.W.6 and on the defendant's side 39 documents were marked as Ex.B.1 to B.39.

8. The Trial Court has framed the following issues:

- 1) Whether the plaintiffs have any share in the property and if so what is the extent?
- 2) Whether the plaintiffs are entitled for the past mesne profit of Rs.15,000/-?
- 3) Whether the stand taken by the defendants that the suit properties were exclusively belonging to Murugesu Gounder and Vengadapathy Gounder by purchase is correct/?
- 4) Whether the Will stated to have been executed on 22.06.1964 by Annammal in favour of Vengadapathy Gounder is true and valid?
- 5) Whether it is true that the plaintiffs are not entitled for any share as contended by the defendants?

In addition to the above issues two more additional issues were framed, namely,

- 1) Since the defendants 3 to 6 have enjoying the properties for more than 20 years, the suit is barred by limitation.
- 2) Whether 7th and 8th defendants are bonafide purchasers without notice of defective title.

9. The Trial Court having found that the plaintiffs have failed to prove that the suit properties are the joint family properties and Murugesu Gounder has got these properties ancestrally and having relied upon Ex.A.6 sale deed dated 04.12.1961 executed by Vengadapathy Gounder in favour of one Viswanatha Gounder is forming part of the settlement executed by Murugesu Gounder in favour of Annammal, copy of which was marked as Ex.A.1, the original marked as Ex.B.7 and also relying upon Ex.B.9 to B.16 under which the Vengadapathy Gounder has obtained properties under registered sale deeds, which cannot be added for partition and therefore, the plaintiffs are not certain about the properties and nature of rights which they are having and having come to a conclusion that on evidence it is proved that there has already been a partition by which Murugesu Gounder who has given properties in favour of his wife Annammal and the remaining properties were given to Vengadapathy Gounder and also on appreciation of evidence has dismissed the suit. It was as against the said dismissal the plaintiffs have filed the present appeal.

10. I have heard the learned counsel for the appellants as well as the respondents and also perused the entire records. The points for consideration which arise in this appeal is as to whether the judgement and decree of the Trial Court in dismissing the suit for partition filed by the plaintiffs is sustainable in law and on facts. An analysis of evidence shows that Murugesu Gounder, the father of the plaintiff died three years after execution of Ex.A.1 dated 16.09.1959, therefore, the said Murugesu Gounder should have died in the year 1962. The case of the plaintiffs is that while the entire suit properties originally belonged to Murugesu Gounder and Murugesu Gounder has settled 1/2 of the said properties in favour of Annammal under a settlement deed dated 16.05.1959 marked as Ex.A.1 and in respect of the remaining 1/2 share Murugesu Gounder died without division and afterwards the plaintiffs as well as defendants 1 and 2 and Vengadapathy Gounder have divided among themselves and enjoying each 1/5th share from 1/2 share of their father. However, it is seen as correctly found by the Trial Court that the first plaintiff who was examined as P.W.1 has specifically admitted that there was no partition after the death of the father since admittedly the father Murugesu Gounder died 30 years before and mother Annammal died 20 years before. The relevant portion of the evidence of P.W.1 is as follows:

"என் தந்தை இறந்த பிறகு, சொத்தை என் அண்ணாந்தான் அனுபவித்து வந்தார் என்றால் சரியல்ல. ஆனால் நான் பாகம் பிரித்துக்கொள்ளவில்லை. என் தந்தை இறந்து 30 வருடம் இருக்கம் என்றால் சரி. அதன் பிறகு என் அண்ணார் தனிப்பட்ட முறையில் கிரயம் வாங்கினார் என்பது தவறு. என் தாய் இறந்து 20 வருடம் இருக்கும் என்றால் சரி."

11. Therefore, as correctly found by the Trial Court the evidence of P.W.1 is contrary to the pleadings. Further, the P.W.1 first plaintiff herself is not certain as to what are the properties which belonged to Murugesu Gounder and what are the properties purchased individually by Vengadasamy Gounder. The relevant portion of the evidence in this regard of P.W.1 is as follows:

"பூர்வீக சொத்து எவ்வளவு, என்றும், தனிப்பட்ட முறையில் வாங்கிய சொத்து எவ்வளவு, என்று சொல்ல முடியாது என்றால் சரி. எக்ஸ்.ஏ.6 கிரயம் பற்றி வழக்கு போட்ட பிறகு தான் எனக்கு தெரியும். அதை அவர் தனிப்பட்ட முறையில் தான் கொடுத்தார்."

12. Admittedly, the said properties which are the subject matter of Ex.A.6 also been included as one of the items of the suit properties. On appreciation of this evidence the Trial Court has come to a definite conclusion that the plaintiffs have not proved that there was a partition among the plaintiffs, first and second defendant and Vengadapathy Gounder in respect of 1/2 share retained by his father Murugesu Gounder. It is specifically admitted by P.W.1 in her evidence that during the lifetime of Vengadapathy Gounder the plaintiffs have not asked for any partition. The one other witness examined on the side of the plaintiffs namely P.W.2 is also not able to substantiate the claim of the plaintiffs that there was a partition among the plaintiffs and defendants 1 and 2 legal heirs of Vengadapathy Gounder after death of their father. A reference to the evidence of P.W.2 shows that he is unable to give any particulars even about the properties owned by Murugesu Gounder.

13. The Trial Court has also found that the documents marked as Ex.B.9 to B.16, which are all after 1968, namely, after the death of Murugesu Gounder and those properties were purchased by Vengadapathy Gounder in his name. The Trial Court having found that when those properties are standing in the name of Vengadapathy Gounder they were also included as suit properties for the purpose of partition has also correctly come to the conclusion that the plaintiffs are not aware of the properties which belong to joint family. A reference to Ex.A.6 sale deed by

which the said Vengadapathy Gounder has sold a portion of the property on 04.12.1961 to Viswanatha Gounder shows that Vengadapathy Gounder had sold the properties treating it as his own self acquired properties even during lifetime of his father Murugesu Gounder who has admittedly died three years after the execution of Ex.A.1 and that should be around 1962.

14. As far as the remaining 1/2 properties of share is concerned which was given by Murugesu Gounder in favour of his wife Annammal by way of settlement under Ex.A.1 dated 16.09.1959, it has been the defendants' case that the said Annammal has executed a Will in favour of her son Vengadapathy Gounder on 22.06.1964 giving away the properties given to her by her husband under Ex.A.1 to her only son Vengadapathy Gounder. It is the said Will was marked as Ex.B.8 and to prove the execution of the said Will the defendants have examined two attesting witnesses, namely, D.W.2 and D.W.3. A reference to the evidence of the said witnesses certainly prove that not only the said will was a registered Will and the witnesses have seen the testator putting her thumb impression and on appreciation of the said evidence the Trial Court has correctly come to a conclusion that the Will Ex.B.8 has been proved in the manner known to law and therefore, Vengadapathy Gounder has become the owner of the properties given to his mother Annammal, apart from the other properties retained by his father Murugesu Gounder. In fact while deciding about the additional issue, the Trial Court has correctly come to a conclusion that more than 20 years defendants 3 to 6 have been in enjoyment of the properties and the plaintiffs have never raised objection and that would amount ouster and in view of the same the suit filed by the plaintiffs are barred by limitation. As correctly pointed by the learned counsel for the respondents, it is clear that the plaintiffs have not proved that the Murugesu Gounder has retained 1/2 of the properties and they were divided by plaintiffs, defendants 1 and 2 and Vengadapathy Gounder. It is relevant to point out that when the plaintiffs case itself is that Murugesu Gounder has settled 1/2 of his properties in favour of his wife Annammal. Even all these properties have been included in the suit Schedule.

15. That apart, it is clear that the evidence of P.W.1 is not certain about the properties, apart from the fact that the properties which are standing in the name of Vengadapathy Gounder which were purchased by him after the death of his father Murugesu Gounder and sold by him to third parties have also been included. Again the Trial Court has found that Ex.B.8 Will executed by Annammal in favour of Vengadapathy Gounder has been proved in the manner known to law and there is absolutely no substance in the contention of the plaintiffs and on the other hand, the judgement of the Trial Court is based on sound reasoning and not perverse.

The submission made by the learned counsel for the appellant based on the Hindu Succession (Amendment) Act, 2005 that by virtue of the amendment the daughter of a coparcenary family is also entitled in her own right in the same manner as son, has no relevance for the reason that the said central amendment which has come into effect from 09.09.2005 which is prospective as it is held by the Hon'ble Supreme Court in Sheela Devi and others Vs. Lal Chand and another reported in 2006(8) SCC 581 and therefore, the amendment is not applicable as far as the facts and circumstances of the present case.

16. In view of the above said legal position and factual circumstances, I am of the considered view that the Trial Court has correctly analysed the documents and evidence in their proper perspective and has come to a correct conclusion by dismissing the suit. In view of the same, the judgement and decree of the court below in O.S.No.3 of 1988 dated 22.02.1990 is confirmed and the first appeal stands dismissed with cost to respondents 4 to 6 and the LRs of the 3rd Respondent namely respondents 9 to 10 and the plaintiffs shall pay the Court fee.

nbj

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Tindivanam.
2. The Collector, Tindivanam District.
3. The Section Officer, Accounts Section, High Court, Madras.
4. The Section Officer, VR Section, High Court, Madras.

Order in
A.S.No.1080 of 1990

BV(CO)
SR/6.7.2007